NO. 06-11612

IN THE SUPREME COURT OF THE UNITED STATES

HOMERO GONZALEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Petitioner, Homero Gonzalez, submits this reply to the Brief in Opposition ("BIO") filed by the United States.

I.

This United States Makes Two Significant Factual Representations In Its Brief That Have No Support In The Record.

In its brief, the United States makes two significant factual representations that have absolutely no support in the record and, indeed, are contradicted by the record. First, the United States asserts that petitioner was "present" during the "exchange" between the United States magistrate judge and counsel for the parties at the bench conference at the outset of the voir dire proceedings. See BIO, at 3; see also BIO, at 15 ("Petitioner's counsel, in petitioner's presence, expressly agreed to have the magistrate judge preside over jury selection."). The court reporter's transcription of the voir dire proceedings, which is attached as Appendix C to the petition for certiorari, clearly shows that petitioner was *not* at the bench during the exchange[1] and, furthermore, did not have the services of a Spanish-speaking interpreter at the time of the exchange. R. 151-52. The record also demonstrates that thereafter - when the attorneys stepped away

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[1] The record shows that at the very outset of the proceedings the magistrate judge asked "*the attorneys* [to] approach the bench." R. 151 (emphasis added).

from the bench and petitioner was then afforded the assistance of an interpreter - the magistrate judge neither asked petitioner whether he also consented nor informed him that his attorney had done so outside of his presence. See id.

The United States's brief contains another factual error. In contending that Mr. Gonzalez's defense counsel consented to the magistrate judge's presiding over jury selection *on behalf of his client*, the United States points to the statement made by counsel in response to a question from the magistrate judge at the bench - "*we* are [going to consent]," R. 151 (emphasis added) - and claims that this statement is tantamount to the statement made by defense counsel in Peretz v. United States, 501 U.S. 923 (1991). See BIO, at 12-13. In Peretz, defense counsel was specifically asked by the magistrate judge whether counsel had his client's consent to have the magistrate judge select the jury, to which defense counsel responded affirmatively (in the presence of his client). Peretz, 501 U.S. at 925 & n.2.

The United States is incorrect that Mr. Gonzalez's defense counsel's use of the plural pronoun "we" expressly or impliedly referred to both counsel and his client, Mr. Gonzalez. Rather, when read in context, it is clear that the term "we" referred to the attorneys (*i.e.*, defense counsel and the prosecutor). Indeed, the prosecutor - *before* defense counsel stated, "[y]es, we are [consenting]" - also stated, "[y]es, *we* are [consenting], your

Honor" in response to the magistrate judge's question. R. 151 (emphasis added). In addition, Mr. Gonzalez was represented by two defense attorneys, both of whom were present at the bench conference, id., which also could explain counsel's use of the plural pronoun. Therefore, the United States's assertion that defense counsel's use of the term "we" demonstrates that he had obtained his client's personal consent is not supported by the record. And, for that reason, both the United States and the Fifth Circuit have erred in claiming that petitioner's case presents a "fact pattern" that is "almost identical" to that in Peretz. See BIO, at 5 (quoting from the Fifth Circuit's decision in petitioner's case). Rather, petitioner's case is distinguishable in a critically important way: unlike in Peretz, the record in petitioner's case unequivocally shows that defense counsel consented outside of petitioner's presence and did not inform the court that his client's consent (as opposed to the attorney's consent) was being given.

II.

The Legal Issue In Petitioner's Case Is Worthy Of This Court's Review.

The United States makes two arguments why certiorari should not be granted in petitioner's case: (1) the circuit split on the legal issue raised in petitioner's case is not significant enough; and (2) petitioner's case allegedly is a "poor vehicle" to decide

the issue because petitioner failed to object in the district court. See BIO, at 6-16. Neither argument has merit.

First, although the Eleventh Circuit is the only circuit court to have issued a decision *directly* contrary to the Fifth Circuit's decision in petitioner's case in a published decision, see BIO, at 11 (citing United States v. Maraqh, 174 F.3d 1202 (11th Cir.), suppl. op. on reh'g, 189 F.3d 1315 (11th Cir. 1999),[2] that precedent appears entrenched and the circuit split will thus persist in the future. See, e.g., Saldana v. United States, 206 Fed. App'x 843, 845 (11th Cir. 2006) (citing Maraqh approvingly); United States v. Woodard, 387 F.3d 1329, 1331-32 (11th Cir. 2004) (same); United States v. Ruiz-Rodriquez, 277 F.3d 1281, 1289-90 (11th Cir. 2002) (same); United States v. Desir, 257 F.3d 1233, 1236-37 (11th Cir. 2001) (same). A recent, cogent dissenting opinion by Ninth Circuit Judge Fisher in United States v. Gamba, 483 F.3d 942, 950-51 (9th Cir. 2007) (Fisher, J., dissenting) - in which he embraced the Eleventh Circuit's decision in Maraqh - also shows that the Eleventh Circuit's decision is not an aberration.

The United States's brief also highlights a larger circuit

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[2] Other circuits have held that a litigant's waiver of the right to an Article III judge must be "voluntary, knowing, and intelligent." See, e.g., Norris v. Schotten, 146 F.3d 314, 326 (6th Cir. 1998) (citing, e.g., Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Under such precedent, the failure to object by a defendant (particularly a Spanish-speaking one) who is totally ignorant of his counsel's consent to have a magistrate judge preside over a critical stage cannot be deemed "voluntary, knowing, and intelligent."

split that could be resolved by this Court in petitioner's case. The United States correctly notes that numerous circuits are divided on the threshold issue of whether some form of "affirmative consent" is required (by either a litigant or her counsel) for a magistrate judge to preside over a critical stage of a trial or whether a mere lack of objection, without more, satisfies the requirements for delegation to a magistrate judge under Article III and the Federal Magistrates Act. See BIO, at 9-11 (discussing conflicting decisions of the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits). Therefore, petitioner's case also is worthy of this Court's review because it presents a vehicle to resolve that circuit split as well, insofar as it is undisputed that in the district court neither petitioner nor his attorney voiced an objection to the magistrate judge's presiding over jury selection. Although petitioner contends that this lack of objection is irrelevant (see Pet. 8-11), the fact that some circuits view a lack of objection as dispositive means that petitioner's case is a good vehicle for this Court to decide that threshold issue - in addition to the more specific issue of whether counsel's consent alone is sufficient, in the event that this Court were to hold that a lack of objection does not foreclose petitioner's claim on appeal.

Regardless of the significance of the foregoing circuit splits, however, the United States's brief entirely fails to

address the point (made in Mr. Gonzalez's petition for writ of certiorari) that the Fifth Circuit's decision conflicts with this Court's decisions in Commodities Future Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986), and New York v. Hill, 528 U.S. 110, 114-15 (2000), when read in conjunction. In Schor, this Court described the constitutional right to an Article III judge as "a personal right," albeit one subject to waiver. Schor, 478 U.S. at 848. In Hill, this Court stated that a criminal defendant need not "personally make an informed waiver" of most rights related to the conduct of a trial and that a defense attorney may waive such rights without the defendant's knowledge or participation in the waiver, Hill, 528 U.S. at 114-15; however, "[f]or certain fundamental rights, the defendant must *personally* make an informed waiver." Id. at 114 (emphasis added)(citing, e.g., Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938) (waiver of right to counsel); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966) (waiver of right to plead not guilty)); accord Taylor v. Illinois, 484 U.S. 400, 417-18 & n.24 (1988) (stating that "there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client" and giving as examples the right to plead not guilty and have a trial; the right to a jury trial; and the right to be present during critical stages of trial) (citations omitted).

In discussing the waiver of the constitutional right to an

Article III judge, this Court in Schor equated that right to the most fundamental, "personal" rights of a criminal defendant - the very same type that this Court mentioned in Hill and Taylor (*i.e.*, those rights which, if waived, require a "personal" on-the-record waiver by a defendant). See Schor, 478 U.S. at 848 ("Moreover, as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, *just as are other personal constitutional rights that dictate the procedures by which . . . criminal matters must be tried.* See, e.g., Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (waiver of criminal trial by guilty plea); Duncan v. Louisiana, 391 U.S. 145, 158, [3]88 S.Ct. 1444, 1452, 20 L.Ed.2d 491 (1968) (waiver of right to trial by jury in criminal case).") (emphasis added).[4] Therefore, when read together, Schor, Hill, and Taylor provide that the fundamental, "personal" right to an Article III judge is the type of constitutional right that must be *personally* waived by a defendant as opposed to the type of right that may be waived by counsel alone without the defendant's knowledge and consent.

The United States errs in contending that this Court in Peretz

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[3] This portion of this Court's decision in Duncan, which discussed waiver of the right to a jury trial, cited Patton, supra, which requires the defendant's "express and intelligent consent" for a waiver to be valid (Patton, 281 U.S. at 312). See Duncan, 391 U.S. at 158 & n.27.

[4] See also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982) (describing Article III's creation of an independent judiciary as a "fundamental principle").

"noted that the failure to raise a timely objection may result in the loss a host of ***personal*** constitutional rights. . . ." BIO, at 7-8 (citing cases) (emphasis added). None of the cases cited by the United States[5] involved the waiver of fundamental, personal constitutional rights.[6] Rather, each of those rights discussed in the cases cited in Peretz, although constitutional in nature, were of the type described by this Court in Hill as being subject to waiver or forfeiture by a defense attorney without the defendant's participation in the waiver. See Hill, 528 U.S. at 114-15. The right to an Article III judge, conversely, is the type of fundamental, personal constitutional right that can be waived only by a criminal defendant through "fully informed and publicly acknowledged consent" by the defendant himself. Taylor, 484 U.S. at 417-18. The Fifth Circuit's decision in petitioner's case is at odds with this important principle.

Finally, the United States's assertion that petitioner's case

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[5] United States v. Gagnon, 470 U.S. 522, 528 (1985) (waiver of right to presence under Fed. R. Crim. P. 43); Levine v. United States, 362 U.S. 610 (1960) (waiver of right to a public trial); Segurola v. United States, 275 U.S. 106 (1927) (waiver of Fourth Amendment right to be free from unreasonable searches and seizures).

[6] Gagnon involved the waiver of the right to presence under Rule 43, not the constitutional right to presence. See Gagnon, 470 U.S. at 528. This Court has stated that the *constitutional* right to presence - as opposed to the much broader Rule 43 right to presence - is a "personal" right that a defendant can only waive through the "fully informed and publicly acknowledged consent of the [defendant]." Taylor, 484 U.S. at 417-18 & n.24 (citing Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963)).

is a "poor vehicle" to decide the legal issues raised by his case because he did not object in the district court, see BIO, at 13, is untenable. As petitioner explained in his petition for writ of certiorari (see Pet. 8-12), the very nature of the consent issue raised by petitioner necessarily means that it *was not raised in the district court*. As Justice Scalia stated in his dissenting opinion in Peretz (on a point not in conflict with the majority):

> As a general matter, of course, a litigant must raise all issues and objections at trial. . . . For criminal proceedings in the federal courts, this principle is embodied in Federal Rule of Criminal Procedure 51, which requires "a party, at the time the ruling or order of the [trial] court is made or sought, [to] mak[e] known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor." Rule 51's command is not, however, absolute. . . . [P]etitioner plainly forfeited the right to advance his current challenges to the Magistrate's role. In certain narrow contexts, however, appellate courts have discretion to overlook a trial forfeiture. The most important of these is described in Federal Rule of Criminal Procedure 52(b): In criminal cases, an appellate court may notice "errors or defects" not brought to the attention of the trial court if they are "plain" and "affec[t] substantial rights." See United States v. Young, 470 U.S. 1, 15, and n. 12, 105 S.Ct. 1038, 1046, and n. 12, 84 L.Ed.2d 1 (1985). . . .
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> Even when an error is not "plain," this Court has in extraordinary circumstances exercised discretion to consider claims forfeited below. See, e.g., Glidden Co. v. Zdanok, 370 U.S. 530, 535-536, 82 S.Ct. 1459, 1464-1465, 8 L.Ed.2d 671 (1962) (opinion of Harlan, J.); Grosso v. United States, 390 U.S. 62, 71-72, 88 S.Ct. 709, 715, 19 L.Ed.2d 906 (1968); Hormel v. Helvering, 312 U.S. 552, 556-560, 61 S.Ct. 719, 721-723, 85 L.Ed. 1037 (1941). In my view, that course is appropriate here. Petitioner's principal claims are that the Federal Magistrates Act does not allow a district court to assign felony voir dire to a magistrate even with the defendant's consent, and that in any event the consent

here was ineffective because given orally by counsel and not in writing by the defendant. ***By definition, these claims can be advanced only by a litigant who will, if ordinary rules are applied, be deemed to have forfeited them: A defendant who objects will not be assigned to the magistrate at all. Thus, if we invariably dismissed claims of this nature on the ground of forfeiture, district courts would never know whether the Act authorizes them, with the defendant's consent, to refer felony voir dire to a magistrate, and, if so, what form the consent must take.*** Cf. 18 U.S.C. § 3401(b) (defendant's consent to magistrate in misdemeanor trial must be in writing).

Given the impediments to the proper assertion of these claims, I believe we are justified in reaching the statutory issue today to guide the district courts in the future performance of their duties. It is not that we must address the claims because all legal questions require judicial answers, cf. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 489, 102 S.Ct. 752, 767, 70 L.Ed.2d 700 (1982); Webster v. Doe, 486 U.S. 592, 612-613, 108 S.Ct. 2047, 2058-2059, 100 L.Ed.2d 632 (1988) (SCALIA, J., dissenting), but simply that the relevant rules and statutes governing forfeiture, as we have long construed them, recognize a limited discretion which it is eminently sensible to exercise here.

Peretz, 501 U.S. at 953-55 (Scalia, J., dissenting); accord Maragh, 189 F.3d at 1316-17 (citing Judge Scalia's opinion with approval).

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Mr. Gonzalez's petition for writ of certiorari, this Court should grant the writ of certiorari.

Date:
August 9, 2007

Respectfully submitted,

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